

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

JOSEPH W. JERRY

CASE NO. 99-61869

Debtor

Chapter 7

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JOHN SACCO

Plaintiff

vs.

ADV. PRO. NO. 99-80179A

JOSEPH W. JERRY

Defendant

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GLENN B. AXELROD

Plaintiff

vs.

ADV. PRO. NO. 99-80180A

JOSEPH W. JERRY

Defendant

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APPEARANCES:

A. SHELDON GOULD, ESQ.  
Attorney for the Plaintiffs Axelrod & Sacco  
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Syracuse, New York 13202

FELT EVANS, LLP  
Attorney for Debtor/Defendant  
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EDWARD D. EARL, ESQ.  
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

The matters presently before this Court arose as cross-motions in two adversary proceedings commenced on July 13, 1999, by the filing of complaints (“Complaints”) on behalf of John J. Sacco (“Sacco”) (Adv.Pro. No. 99-80179) and Glenn B. Axelrod (“Axelrod”) (Adv. Pro. No. 99-80180) (hereinafter jointly referred to as the “Plaintiffs”) against Joseph W. Jerry (“Debtor/Defendant” or “Jerry”). On May 10, 2000, Plaintiffs filed separate motions in their respective adversary proceedings requesting that they be permitted to amend their Complaints to add causes of actions based on §§ 523(a)(4) and (6) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”).<sup>1</sup> Debtor/Defendant’s counsel opposed the motions, arguing that the proposed amended complaints, which rely to a large extent on factual allegations asserted in a prior state court action, are ambiguous and fail to state a cause of action. Additionally, the Debtor/Defendant filed a cross-motion in each adversary proceeding on May 24, 2000, seeking a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), incorporated by reference in Rule 7012 of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”) in the event that the Court agreed to allow the Plaintiffs to amend their Complaints.

Oral argument was heard at the Court’s regular motion term in Syracuse, New York, on June 6, 2000. The Court granted the Plaintiffs’ motions to amend their Complaints. Counsel for the Debtor/Defendant acknowledged that the Plaintiffs had asserted sufficient facts in their Amended Complaints to state a claim pursuant to Code § 523(a)(2) and (4), given the

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<sup>1</sup> Plaintiffs’ original complaints alleged a single cause of action based on Code § 523(a)(2)(A).

incorporation of the complaint from the state court action (“State Court Complaint”).<sup>2</sup>

The Court adjourned the hearing on the Debtor/Defendant’s cross-motion with respect to the Plaintiffs’ cause of action based on Code § 523(a)(6) to July 5, 2000, and, thereafter, provided the parties with an opportunity to file memoranda of law solely on the issue of whether it was necessary for the Plaintiffs to provide more definite statements with respect to the relief they sought pursuant to Code § 523(a)(6). The matter was submitted for decision on August 8, 2000.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of these adversary proceedings pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(I).

### **FACTS**

On or about March 4, 1992, the Plaintiffs commenced an action against Jerry in New York State Supreme Court, Onondaga County. *See* Exhibit 3 of Complaints, filed July 13, 1999. According to the State Court Complaint, the Plaintiffs retained Jerry to represent them in connection with the acquisition and development of real property sometime in late 1988. *See* State Court Complaint at ¶ 10. The State Court Complaint alleges eleven causes of action,

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<sup>2</sup> Pursuant to Fed.R.Civ.P. 10(c), “[s]tatements in a pleading may be adopted by reference in . . . another pleading.”

including one pursuant to § 487 of the New York Judiciary Law (“NYJL”), in which the Plaintiffs assert that Jerry’s conduct in his representation of them was deceitful and collusive (*see* ¶ 85 of the State Court Complaint), as well as malicious and committed with reckless disregard for the Plaintiffs’ interests and rights (*see* ¶ 89 of the State Court Complaint). In this regard, Plaintiffs asserted that they were entitled to treble damages pursuant to NYJL § 487. *See* ¶ 88 of the State Court Complaint.

On April 30, 1998, the parties entered into a Court Ordered Stipulation pursuant to which the Debtor/Defendant consented to judgment and admitted to liability. *See* Exhibit 1 and 2 of the Complaints. On September 10, 1998, an inquest on damages was held before the Hon. Charles T. Major, Justice, New York State Supreme Court. *See* Exhibit 4 of the Complaints. Justice Major ordered judgment in favor of Sacco in the amount of \$2,277,000, plus costs and disbursements of \$475.51, and in favor of Axelrod in the amount of \$1,026,000, both awards representing treble damages pursuant to NYJL § 487. *See id.*

Jerry filed a voluntary petition pursuant to chapter 11 of the Code on April 8, 1999. As noted above, the Plaintiffs filed their original complaints commencing the two adversary proceedings on July 13, 1999. On August 20, 1999, Jerry filed a motion to convert his case from chapter 11 to chapter 7. Said motion was granted by Order of this Court, dated September 17, 1999. Plaintiffs filed their Amended Complaints on July 6, 2000, following the hearing on June 6, 2000, at which the Court granted Plaintiffs’ motion to amend their Complaints. Answers were filed by the Debtor/Defendant on July 13, 2000, in both proceedings.

Plaintiffs’ third causes of action, beginning with ¶ 12 of the Amended Complaints, repeats

and realleges ¶¶ 1-9.<sup>3</sup> Paragraph 13 of the Amended Complaints states further

13. That all of the above actions were done intentionally by the defendant in his dealings with the plaintiff.

14. In all of the actions above, the defendant knew the reasonable, foreseeable and predictable consequences of his actions, that is the detrimental affect this would have on the plaintiff.

15. All of the above acts were done intentionally by the defendant, who knew the consequences of said acts, knew that by intentionally not disclosing conflicts of interest, not recording the mortgage for 2 years and allowing the plaintiff's partner to take title to properties in the partners name, therefore, converting the plaintiff's funds to the partners own use, the defendant knew that reasonable, predictable, foreseeable consequences of his acts, and that all of them would lead to the detriment to a plaintiff that was his client and that he owed a duty of representation above all else.

16. That such intentional conduct by the defendant, knowing the consequences and foreseeability of the actions, was willful and malicious and a breach of his duty as the plaintiff's attorney.

## DISCUSSION

Code § 523(a)(6) provides that “[a] discharge under section 727 . . . of this title does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity . . . .” Although Plaintiffs have not cited

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<sup>3</sup> Plaintiffs' Amended Complaints refer to the exhibits attached to the original Complaints but do not include them. *See* ¶ 7 of the Amended Complaints. Because the Court is allowing the Plaintiffs to incorporate the State Court Complaint pursuant to Fed.R.Civ.P. 10(c), it will be necessary for the Plaintiffs to again amend their complaints to include the copy of the State Court Complaint. The other three exhibits, which include the State Court Ordered Stipulation, as well as transcripts of the state court proceedings on April 30, 1998, and September 10, 1998, are deemed not to be pleadings and, therefore, they need not be incorporated in any second amended complaints.

specifically to Code § 523(a)(6), the Court gleans from the allegations found in the Plaintiff's third causes of action that they are based on Code § 523(a)(6) in that both refer to actions done intentionally. *See* ¶ 15 of the Amended Complaint. Plaintiffs also allege that Jerry's conduct was willful and malicious in that he knew the consequences that would result from his actions to the detriment of the Plaintiffs. *See id.* at ¶ 16.

Whether to require a more definite statement pursuant to Fed.R.Civ.P. 12(e) is a matter of the Court's discretion. *See In re Rimsat, Ltd.*, 223 B.R. 345, 346-47 (Bankr. N.D. Ind. 1998) (citations omitted). "Such a motion can be sustained only if a complaint is unintelligible, not merely if it is lacking details, and such motions are not favored." *In re American Intern. Airways Inc.*, 66 B.R. 642, 645 (Bankr. E.D. Pa. 1986). It is expected that any pertinent details will surface in the course of discovery. *See Erickson v. Hunter*, 932 F.Supp. 1380, 1384 (MD. Fla. 1996).

The filing of an answer renders the request for a more definite statement moot. *See In re Dunlevy*, 75 B.R. 914, 919 (Bankr. S.D. Ohio 1987) (stating that "a request 'for a more definite statement, *see* Rule 12(e), is barred by the filing of an answer'", quoting *In re Stephen W. Grosse, P.C.*, 68 B.R. 847, 850 (Bankr. E.D. Pa. 1987)); *Clark v. Associates Commercial Corp.*, 149 F.R.D. 629, 633 (D. Kan. 1993); *see also Hicks v. Arthur*, 843 F.Supp. 949, 958 (E.D. Pa. 1994) (noting that requiring a more definite statement is appropriate when the opposing party cannot respond with simple denials in good faith). In these proceedings, the Debtor/Defendant filed his answers to the Amended Complaints on July 13, 2000. The answers address all three causes of action and include general denials with respect to the third causes of action. Because the Debtor/Defendant filed answers to the Amended Complaints, the Court concludes that it need not

consider requiring the Plaintiffs to furnish more definite statements in connection with their causes of action based on Code § 523(a)(6).

Based on the foregoing, it is hereby

ORDERED that Debtor/Defendant's motions seeking a more definite statement with respect to the Plaintiffs' causes of action based on Code § 523(a)(6) are denied; it is further

ORDERED that each of the Plaintiffs file and serve within fifteen (15) days of the date of this Order a Second Amended Complaint, attaching the State Court Complaint as an exhibit; it is further

ORDERED that the each of the Plaintiffs identify the specific subsection of Code § 523(a) which forms the basis for each of his three causes of action asserted against the Debtor/Defendant in the Second Amended Complaint; and it is finally

ORDERED that the two adversary proceedings (Adv. Pro. 99-80179 and Adv. Pro. 99-80180) be consolidated for purposes of the trial pursuant to Fed.R.Bankr.P. 7042 in view of the fact that the actions involve common questions of law and fact.

Dated at Utica, New York

this 5th day of February 2001

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge